

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PAULETTE M. ESTES, on behalf of
herself and her marital community,

Plaintiff,

V.

WELLS FARGO HOME MORTGAGE;
FEDERAL NATIONAL MORTGAGE
ASSOCIATION; and NORTHWEST
TRUSTEE, INC.,

Defendants.

CASE NO. C14-5234 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS AND/OR MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S
MOTION TO CONTINUE

This matter comes before the Court on Defendants Wells Fargo Bank, N.A.¹

(“Wells Fargo”) and Federal National Mortgage Association’s (“Fannie Mae”)

(collectively “Defendants”) Fed. R. Civ. P. 12(b)(6) and/or 56(a) motion for an order

dismissing claims with prejudice and/or granting summary judgment (Dkt. 13); and on

¹⁰ Blackiff, B., 1974, "M. E. (the 'E. E.') and the question of D. S. (the 'S.') in the 'S.

¹ Defendants state that Estes “incorrectly named Wells Fargo Home Mortgage as a defendant. Wells Fargo Home Mortgage is merely a division of Wells Fargo Bank, N.A. It is not a separate legal entity.” Dkt. 13 at 1, n. 1.

I. PROCEDURAL HISTORY

2 On March 19, 2014, a notice of removal was filed in this matter. Dkt. 1. Attached
3 to that notice was Estes's complaint, filed in Clark County Superior Court. Dkt. 1-1 at 4-
4 18 ("Comp"). Estes alleges (1) breach of contract, (2) breach of the covenant of good
5 faith and fair dealing, (3) violation of Washington's Consumer Protection Act
6 ("WCPA"), (4) misrepresentation, (5) intentional infliction of emotional distress, and (6)
7 promissory estoppel. *Id.*

8 On May 5, 2014, Defendants filed the instant motion seeking dismissal of all
9 Estes's claims. Dkt. 13. On May 29, 2014, Estes filed a motion to continue Defendants'
10 motion for summary judgment. Dkt. 16. On May 30, 2014, Estes filed a brief in
11 opposition to Defendants' motion. Dkt. 18. On June 4, 2014, Defendants filed a brief in
12 opposition to Estes's motion to continue the motion for summary judgment. Dkt. 19. On
13 June 5, 2014, Estes filed a reply to Defendants' brief in opposition to their motion to
14 continue. Dkt. 20. On June 6, 2014, Defendants filed a reply to Estes's opposition to
15 their motion seeking dismissal of their claims. Dkt. 21.

II. BACKGROUND

17 In 2002, Estes and her husband obtained a home loan, secured by a deed of
18 trust on the property. Dkt. 1-1 at ¶ 4.2. Soon after the home loan's inception, Fannie Mae
19 became the owner of the loan and Wells Fargo began servicing the loan. *Id.* ¶¶ 4.3, 4.4.

20 In December 2008, Estes contacted Wells Fargo to discuss options for lowering
21 her mortgage payment. *Id.* ¶¶ 4.10. Over the next few months, Estes alleges that she sent
22 the requested financial information to Wells Fargo to be considered for a loan

1 modification. *Id.* ¶ 4.9. According to Estes, she received a September 22, 2009 letter
2 from Wells Fargo, which stated:

3 Based on our recent conversation about your current mortgage payment
4 issues, we've gone back and carefully reviewed your situation and the
5 information you provided. That's why we're writing you today – to let you
6 know the results of our review. You may be eligible for a trial modification
7 plan under the government's Home Affordable Modification Program, and
8 we estimate your new payment amount to be \$1,167.

9 *Id.* ¶ 4.10. Estes states that the letter explained step-by-step how to proceed with the
10 modification process:

11 (1) You must call us to finalize this offer by October 6, 2009 so that we can
12 establish your trial modification plan; (2) During the phone call, we'll
13 schedule a date for your first trial payment using our free Wells Fargo Easy
14 Pay automatic payment service (3) You will need to make two
15 additional payments at your modified amount using Wells Fargo Easy Pay
16 over the following sixty days; (4) Within a week of setting up your trial
17 payments, we will send you a package of information that clearly spells out
18 the full terms and documentation you need to supply.

19 *Id.* ¶ 4.11. The letter closed with the following statement:

20 Don't let this opportunity to lower your monthly mortgage payments
21 through the Home Affordable Modification Program pass you by. Call us
22 right away to schedule your required trial period payment, and you are in
the program. It's that easy.

23 *Id.* ¶ 4.12.

24 Estes alleges that she never received the promised packet of information that
25 clearly spells out the full terms and documents she would need to supply. *Id.* ¶ 4.13.

26 Estes further alleges that on October 2, 2009, she scheduled her three trial payments with
27 Wells Fargo to be made on October 10, November 10 and December 10, 2009. *Id.* ¶ 4.14.

28 According to Estes, during a call with Wells Fargo representative, Monica, the bank

1 requested no further documentation from Estes. *Id.* Before accepting the trial
2 modification offer, Estes alleges that she was current on her mortgage with the unpaid
3 principal balance at approximately \$283,360.20. *Id.* ¶ 4.15.

4 According to Estes, after she made the first payment on the trial plan, she received
5 a letter stating she and her husband were in default on their mortgage. *Id.* ¶ 4.16. Estes
6 alleges that she called and spoke to a Wells Fargo representative, Melissa, who explained
7 that Estes was technically late on her loan payment per the original note; however,
8 Melissa also indicated Estes was in the home loan modification program and working
9 under a different payment plan. *Id.* Melissa instructed Estes to continue to make the trial
10 payments. *Id.* No further documents were requested from Estes at that time. *Id.* Estes
11 alleges that she continued to make monthly trial payments at the modified rate for fifty
12 (50) months. *Id.* ¶ 4.17.

13 Estes alleges that she continued to call Wells Fargo to check on the status of her
14 modification. She alleges that on January 6, 2010, she contacted Wells Fargo and was
15 instructed by them to send updated financial information by fax; she did so that same day.
16 *Id.* ¶ 4.18. On March 14, 2010, Estes alleges that she received a letter from the bank
17 stating:

18 Unfortunately, after carefully reviewing the information you've provided,
19 we are unable to adjust the terms of your mortgage. We can only process
20 your request for payment assistance if we have additional information
from you. We have been unable to reach you to discuss your situation.
For that reason, you have not been approved for assistance with your
21 current payment challenges.
22

1 *Id.* ¶ 4.19. On March 11, 2010, Estes alleges that she phoned Wells Fargo and spoke
2 with a representative, Diane, who instructed her to re-fax all her financial documents,
3 which Estes did that same day. *Id.* ¶ 4.20. According to Estes, on March 17, 2010, she
4 received a loan modification starter kit sent by mail from Wells Fargo, which contained
5 forms that she completed, including updates regarding her financial information. *Id.* ¶
6 4.21. Estes alleges she sent her completed application on April 3, 2010. *Id.*

7 On August 13, 2010, Estes alleges that she received a letter which stated:

8 Unfortunately, after carefully reviewing the information you've provided,
9 we are unable to adjust the terms of your mortgage. You have not been
10 approved for a mortgage loan modification because we were unable to get
you a modified payment amount that you could afford per the investor
guidelines on your mortgage.

11 *Id.* ¶ 4.22. According to Estes, throughout 2010 and 2011, she continued to submit
12 documentation to the bank in an attempt to have her loan permanently modified. *Id.* ¶
13 4.23. However, in early 2011, Estes alleges that she received a notice of default from
14 Northwest. *Id.* Nonetheless, she continued to make payments to Wells Fargo at the
15 modified trial payment amount. *Id.* Estes alleges that Wells Fargo returned her January,
16 February and March 2011 payments, although it accepted subsequent payments. *Id.*

17 Additionally, in early 2011, Estes further alleges that she filed a complaint with
18 the Office of the Comptroller of the Currency regarding another attempt to have Wells
19 Fargo permanently modify her loan. *Id.* ¶ 4.24. Estes alleges she was connected to Ms.
20 Kelly Crippen ("Crippen") at Wells Fargo, who promised that if Estes eliminated the
21 \$465.00 payment for her handicapped accessible van, the bank would offer her a loan
22 modification. *Id.* Estes alleges she spoke with her siblings about taking over payments

1 on the van. *Id.* According to Estes, Crippen instructed her to fax over documentation
2 that the van payments would be paid by her siblings; she did so in June 2011. *Id.* In July
3 2011, another Wells Fargo representative phoned Estes to inform her that eliminating the
4 van payments from her monthly expenses would not fix the problem, and the bank would
5 not modify her loan. *Id.*

6 Estes alleges that she received a letter from Wells Fargo dated October 30, 2012
7 again denying her request for mortgage assistance. *Id.* ¶ 4.25. According to Estes, the
8 letter stated:

9 We carefully reviewed the information you provided and explored a
10 number of mortgage assistance options. At this time, we have determined
11 that you do not meet the investor requirements of the program because:
12 You have exceeded the number of modifications allowed by the investor.

13 *Id.*

14 On or about June 24, 2013, Estes received a notice of default from
15 Northwest, indicating a past due amount of \$73,935.69. *Id.* ¶ 4.26. According to
16 Estes, she made the modified payment on her loan since October 2009 with the
17 only exception being her withholding of a November 2012 payment at the
18 instruction of a “HUD housing counselor” following an unsuccessful foreclosure
19 mediation with Wells Fargo. *Id.* In October 2013, Wells Fargo returned Estes’s
20 \$1,167 trial payment. *Id.*

III. DISCUSSION

A. Motion to Dismiss Standard

3 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil
4 Procedure may be based on either the lack of a cognizable legal theory or the absence of
5 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d
6 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is
7 construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir.
8 1983). To survive a motion to dismiss, the complaint does not require detailed factual
9 allegations but must provide the grounds for entitlement to relief and not merely a
10 “formulaic recitation” of the elements of a cause of action. *Bell Atlantic Corp. v.
11 Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege “enough facts to state a
12 claim to relief that is plausible on its face.” *Id.* at 1974. In the event the court finds that
13 dismissal is warranted, the court should grant the plaintiff leave to amend unless
14 amendment would be futile. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
15 1052 (9th Cir. 2003).

B. Breach of Contract

17 A contract requires offer, acceptance and consideration. *See Yakima County Fire*
18 *Protection Dist. No. 12 (West Valley) v. Yakima*, 122 Wn.2d 371, 389–90 (1993). A
19 breach of contract is actionable if “the contract imposes a duty, the duty is breached, and
20 the breach proximately causes damage to the claimant.” *Northwest Independ. Forest Mfrs. v.*
21 *Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712 (1995). In the special context of a TPP
22 under HAMP, where “borrowers allege . . . that they have fulfilled all of their obligations

1 under the TPP, and the loan servicer has failed to offer a permanent modification, the
2 borrowers have valid claims for breach of the TPP agreement.” *Corvello v. Wells Fargo*
3 *Bank, NA*, 728 F.3d 878, 884 (9th Cir. 2013). “If a borrower does not qualify for the
4 HAMP program, the servicer must not only alert the borrower, but must consider
5 alternatives.” *Id.* at 881.

6 In this case, Estes argues that there was a valid enforceable contract between her
7 and Wells Fargo. The Court agrees to the extent that Wells Fargo was required to notify
8 Estes whether she qualified for a permanent modification and, if Estes did not qualify, to
9 consider alternatives. Estes alleges in the complaint that Wells Fargo not only notified
10 Estes that she did not qualify but also that Wells Fargo considered alternatives. ¶ 4.25.
11 However, what is unclear from the complaint is whether Estes fulfilled her obligations
12 under the TPP and whether Wells Fargo improperly denied Estes a permanent
13 modification. There are conflicting factual allegations regarding oral promises that Estes
14 would qualify under certain circumstances and that Estes failed to qualify under all
15 circumstances. Therefore, the complaint fails to allege an essential fact underlying
16 Estes’s claims for breach of contract and Defendants’ motion is granted on this issue.
17 The Court also grants Estes leave to amend because it is not clear at this point that any
18 amendment is futile.

19 With respect to the statute of limitations, the statute begins to run at the time of the
20 alleged breach. *North Coast v. Factoria Partnership*, 94 Wn. App. 855, 859 (1999)
21 (“Our courts have consistently held that the statute of limitations in a contract action
22 begins to run when the contract is breached.”). There exists a plausible theory that the

1 statute began to run when Wells Fargo finally denied Estes a loan modification in the
2 letter dated October 30, 2012. Comp. ¶ 4.25. Therefore, Estes timely filed her claim and
3 amendment would not be futile.

4 With regard to Estes's argument that the TPP and subsequent performance created
5 a binding loan modification, this claim fails as a matter of law. Under no plausible theory
6 of law can the TPP, alleged oral promises, and/or temporary performance completely and
7 finally alter the terms of a 30-year note secured by real property. Therefore, the Court
8 finds that this claim fails as a matter of law and is dismissed with prejudice.

9 **C. Good Faith and Fair Dealing**

10 "An implied covenant of good faith inheres in every contract." *Edmonson v.*
11 *Popchoi*, 172 Wn.2d 272, 280 (2011). The duty of good faith requires "faithfulness to an
12 agreed common purpose and consistency with the justified expectations of the other
13 party." *Id.* (citing Restatement (Second) of Contracts § 205 cmt. a (1981)).

14 In this case, Estes admits that her complaint is insufficient to support this claim.
15 At this point, it is unclear whether Wells Fargo breached the implied covenant of good
16 faith with regard to the TPP agreement. Estes could plausibly allege facts that, over the
17 course of the three-year ordeal, would support a claim that Wells Fargo failed to operate
18 with faithfulness to an agreed common purpose or consistent with the justified
19 expectations of Estes. Therefore, the Court grants Defendants' motion on this issue and
20 grants Estes leave to amend this claim.

1 **D. CPA**

2 In order to support a claim for violation of the CPA, a plaintiff must allege: (1) an
3 unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that impacts
4 the public interest; (4) causes injury to the Plaintiff's business or property; and (5) the
5 injury is causally linked to the unfair or deceptive act or practice. *Hangman Ridge*
6 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). An unfair or
7 deceptive practice is one that "has the capacity to deceive a substantial portion of the
8 public." *Id.* at 785. Failure to satisfy even one element is fatal to a CPA claim. *Id.* at
9 793.

10 In this case, Defendants argue that Estes has failed to allege facts to support the
11 first and third elements of a CPA claim. Dkt. 13 at 14–15. The Court agrees with
12 Defendants. However, the Court is not persuaded that any amendment would be futile.
13 Estes does allege that Wells Fargo is working with thousands of Washington residents on
14 loan modifications. Estes argues that it is likely that other residents have been lured into
15 the prospect of temporary loan modifications only to be later rejected for the program and
16 served with subsequent notices that they are severely behind and in default of the original
17 mortgages. Dkt. 18 at 15–16. Such allegation would seem to state a valid CPA claim.
18 Therefore, the Court grants Defendants' motion on this claim and grants Estes leave to
19 file an amended complaint.

20 **E. Negligent Misrepresentation**

21 The tort of negligent misrepresentation occurs when the defendant, in the course
22 of business, profession, employment, or a transaction in which the defendant has a

1 pecuniary interest, negligently supplies false information for the guidance of others in
2 their business transactions, and the plaintiff justifiably relies on such information to his
3 detriment. *Austin v. Ettl*, 171 Wn. App. 82, 88 (2012).

4 In this case, Defendants argue that Estes has failed to allege that Wells Fargo
5 provided her with false information, that she justifiably relied on such information, or
6 that she suffered pecuniary loss. Dkt. 13 at 16–17. The Court agrees that Estes has failed
7 to adequately plead this claim. Moreover, Estes’s primary allegations rely on Wells
8 Fargo’s promised future conduct. Comp. ¶¶ 5.23–5.25. While failure to act in
9 accordance with a promise is sufficient to establish a breach of contract claim, it is not
10 sufficient to establish a negligent misrepresentation claim because Wells Fargo must
11 make a “false representation as to a presently existing fact” *Havens v. C & D*
12 *Plastics, Inc.*, 124 Wn.2d 158, 182 (1994). Although it seems likely any amendment
13 would be futile as to all elements of this claim, the Court is unable to reach that
14 conclusion at this time. Therefore, the Court grants Defendants’ motion on this claim and
15 grants Estes leave to amend.

16 **F. Infliction of Emotional Distress**

17 The elements of the tort of outrage are: “(1) extreme and outrageous conduct; (2)
18 intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff
19 of severe emotional distress.” *Kirby v. City of Tacoma*, 124 Wn. App. 454, 473 (2004).

20 In this case, Defendants argue that Estes has failed to allege any extreme or
21 outrageous conduct. Dkt. 13 at 17–18. The Court agrees that no allegation in the
22 complaint rises to the level of conduct that goes “beyond all possible bounds of decency,

1 and [could] be regarded as atrocious, and utterly intolerable in a civilized community.”
2 *Strong v. Terrell*, 147 Wn. App. 376, 385 (2008). The Court, however, is unable to
3 conclude that any amendment would be futile. Therefore, the Court grants Defendants’
4 motion on this issue and grants Estes leave to amend.

5 **G. Promissory Estoppel**

6 Promissory estoppel requires: “(1) A promise which (2) the promisor should
7 reasonably expect to cause the promisee to change his position and (3) which does cause
8 the promisee to change his position (4) justifiably relying upon the promise, in such a
9 manner that (5) injustice can be avoided only by enforcement of the promise.” *Corbit v.*
10 *J.I. Case Co.*, 70 Wn.2d 522, 539 (1967).

11 In this case, Defendants argue that Estes fails to allege any clear promise. Dkt. 13
12 at 18. Estes counters that Wells Fargo promised to permanently modify her loan if Estes
13 completed certain acts and Wells Fargo promised to modify her loan if she eliminated a
14 certain amount of expenses. Dkt. 18 at 19. To the extent that Defendants only challenge
15 these two statements, the Court denies Defendants’ motion. The allegation that the Wells
16 Fargo representative promised that Estes would qualify for a loan if she eliminated the
17 disability van payment is a sufficient allegation to support the promise element of Estes’s
18 claim.

19 **H. Fannie Mae**

20 Defendants argue that Estes makes no claims against the owner of the loan, Fannie
21 Mae, so its claims against that entity should be dismissed. Dkt. 13 at 6. Although Estes
22 counters with a theory under which Fannie Mae may be liable, Estes fails to provide

1 sufficient factual allegations in her complaint to support the theory of vicarious liability.
2 Therefore, the Court grants Defendants' motion on this issue. Estes, however, may have
3 leave to amend to include such allegations because Defendants fail to show that any such
4 amendment would be futile.

5 **I. Summary Judgment**

6 In light of the fact that the Court has granted Estes leave to amend her complaint,
7 summary judgment is premature. Therefore, the Court denies Defendants' summary
8 judgment motion and denies Estes's motion to continue as moot.

9 **IV. ORDER**

10 Therefore, it is hereby **ORDERED** that Defendants' Fed. R. Civ. P. 12(b)(6)
11 and/or 56(a) motion for an order dismissing claims with prejudice and/or granting
12 summary judgment (Dkt. 13) is **GRANTED in part** and **DENIED in part** as set forth
13 herein and Estes's motion to continue Defendants' motion for summary judgment (Dkt.
14 16) is **DENIED is moot**.

15 Dated this 20th day of August, 2014.

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BENJAMIN H. SETTLE
19 United States District Judge
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